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No. 80-6045

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

RUBIN KREMER,

Petitioner,

v.

CHEMICAL CONSTRUCTION CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

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The fundamental issue in this case is a question of statutory interpretation: In enacting Title VII, what did Congress intend that a Federal court hearing a Title VII action should give to the prior decision of a state appellate court that was limited to reviewing a state agency determination under an arbitrary and capricious standard. The language, structure and intent of Title VII, particularly as specifically interpreted by this Court, compel the conclusion that Congress cannot possibly have intended such limited state court review of an administrative decision entirely to foreclose a Title VII action.

As we demonstrated in our opening brief, this Court has concluded repeatedly, after extensive analysis of the legislative history of Title VII, that Congress intended to grant

plaintiffs the right to a trial *de novo* in Federal court. *See New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980); *Chandler v. Roudebush*, 425 U.S. 840 (1976); *Alexander v. Garnder-Denver Co.*, 415 U.S. 36 (1974); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). While respondent attempts to distinguish these cases on the narrow ground that they did not decide the precise question presented here (Resp. Brief at 38-39), the fact is that they thoroughly considered Congress' intent and their analysis of it cannot be squared with respondent's view of Title VII.

Apart from the Second Circuit, every court of appeals that has considered the question has rejected respondent's view.* In addition to these cases cited in our opening brief (Pet. Brief at 13 n.11), the Seventh and Ninth Circuits, specifically relying on *Alexander v. Garnder-Denver Co., supra*, recently have also "soundly rejected" the position of the court of appeals in this case. *Unger v. Consolidated Foods Corp.*, 657 F.2d 909, 913-14 and n.5 (7th Cir. 1981); *Aleem v. General Felt Industries, Inc.*, slip op. 5587 (9th Cir., November 12, 1981).

*Moreover, the Second Circuit has not set forth the basis for its position on the issue. In this case, it cited *Sinicropi v. Nassau County*, 603 F.2d 60 (2nd. Cir.), *cert. denied* 444 U.S. 983 (1979), and in *Sinicropi*, it followed *Mitchell v. National Broadcasting Co.*, 553 F.2d 265 (2nd. Cir. 1977), with no explanation (the question not having been briefed by either side) of why the rules of preclusion applicable to claims under 42 U.S.C. §1981 should be extended to Title VII actions.

I.

CONTRARY TO RESPONDENT'S CONTENTIONS, CONGRESS NEVER INTENDED THAT STATE PROCEEDINGS WOULD HAVE PRECLUSIVE EFFECT UPON TITLE VII LITIGATION IN THE FEDERAL COURTS

When Congress enacted Title VII, it knew that some states and localities had antidiscrimination procedures and some had none at all. Some of these procedures included resort to state courts either to review administrative determinations, as does New York's, or to prosecute "criminal proceedings", 42 U.S.C. §2000e-5(c). With this background, Congress expresssly provided that in proceedings before the EEOC, "final findings and orders made by state and local authorities" are to be accorded "substantial weight", not preclusive effect. 42 U.S.C. §2000e-5(b). This Court has ruled that under Title VII, "[p]rior administrative findings made with respect to an employment discrimination claim may, of course, be admitted as evidence at a . . .trial *de novo*. See Fed. Rule Evid. 803(8)(C). *Cf. Alexander v. Garnder-Denver Co.*, 415

U.S. 36, 60 n.21". *Chandler v. Roudebush, supra*, 425 U.S. at 863 n.39.* In *Alexander*, this Court instructed that a prior decision on a discrimination claim (there by a labor arbitrator) "may be admitted as evidence and accorded such weight as the court deems appropriate". 415 U.S. at 60. In footnote 21 of *Alexander*, cited in *Chandler*, the Court went on to specify the factors that should be taken into account in determining the "appropriate" weight. Lower Federal courts have consistently applied this standard to state determinations, both administrative and judicial.**

Congress and this Court have thus determined that, in Title VII actions, prior state proceedings are to be given "substantial" weight before the EEOC and "such weight as the court deems appropriate" before a Federal court. Respondent argues however, that these principles should be disregarded and the state court judgement should instead be given totally preclusive effect by operation of 28 U.S.C. §1738.

*The fact that, as respondent argues (Resp. Brief at 38), *Chandler* involved a Federal court proceeding following an adjudication by a Federal administrative agency (the Veterans Administration as affirmed by the Civil Service Commission Appeals Board, 425 U.S. at 842, not the EEOC as respondent inaccurately asserts) does not affect the import of the Court's holding. Clearly, there was no reason for Congress to require greater deference to a state agency determination than to a Federal Agency decision when it granted Federal jurisdiction over Title VII claims.

**See, e.g., *Unger v. Consolidated Foods Corp.*, *supra*, 657 F.2d at 914-15; *Smouse v. General Electric Co.*, 626 F.2d 333, 335 (3rd. Cir. 1980); *Gunther v. Iowa State Men's Reformatory*, 612 F.2d 1079, 1084-85 (8th Cir.), *cert. denied* 446 U.S. 966 (1980); *Batiste v. Furnco Construction Corp.*, 503 F.2d 447, 451 (7th Cir. 1974), *cert. denied*, 420 U.S. 928 (1975), *Cooper v. Phillip Morris, Inc.*, 464 F.2d 9, 12 (6th Cir. 1972).

Congress intended no such result. Section 1738 was enacted by the First Congress in 1790 to provide that the new Federal courts would give full faith and credit to state court judgments. *See Allen v. McCurry*, 449 U.S. 90, 96 (1980). The statute codified common law principles of res judicata. The fact that Congress and this Court, almost two centuries later, as part of a complex statutory scheme dealing solely with employment discrimination, determined that the EEOC and the Federal courts should give evidentiary "weight", but not preclusive effect, to state determinations is no more an "implied repeal" of section 1738 (*see* Resp. Brief at 26-27) than is the venue provision of Title VII, 42 U.S.C. §2000e-5(f)(3), and "implied repeal" of differing provisions of the general venue statute, 28 U.S.C. §1391. When Congress creates a special statutory procedure to deal with a particular problem, it frequently changes the general rules of civil practice that would otherwise apply. There is not an inconsistency; there is simply a new, precisely articulated, "unique statutory structure", *Unger v. Consolidated Foods Corp.*, *supra*, 657 F.2d at 914 n.5, to be applied on its own terms.*

How respondent's proposed construction of Title VII would significantly undermine the remedial provisions central

*In *Chandler v. Roudebush*, *supra*, where the question presented was whether a Federal employee had the right to a trial *de novo* after her claim had been rejected by a Federal agency, respondent by the same "implied repeal" logic would have argued that Title VII "repealed" the agency review provisions of the Administrative Procedure Act. But this Court did not even consider the question in those terms. It simply looked to the "language of the statute", 425 U.S. at 843, and its legislative history—as we are urging it to do here. *See Newsom v. Vanderbilt University*, 653 F.2d 1100, 1107-08 (6th Cir. 1981) (citing *Chandler* for proposition that APA "does not prevent the court form engaging in *de novo* review where the language of the statute or the legislative history authorize a trial *de novo*").

to the enforcement of the statute can be shown in several ways. As the EEOC points out, respondent's argument leads to the anomalous result that the Federal courts would be precluded from considering Title VII claims where there had been a state court appeal, but the EEOC would not be. (Amicus Brief of the United States and EEOC at 11-12.) Of course, such a construction would render EEOC consideration of the claim "meaningless", since the employer, knowing that the EEOC had no enforcement powers and that the Federal court could not grant relief, would have no incentive to join in conciliation efforts. (*Id.*)

Moreover, respondent overlooks the fact that companion general provisions of Title 28 require Federal courts to give full faith and credit not only to state *judicial* determinations, but to state *administrative* determinations as well. In language paralleling that of section 1738, 28 U.S.C. § 1739 provides that:

> "All nonjudicial records or books kept in any public office of any State . . .shall have the same full faith and credit in every court and office within the United States. . .as they have by law or usage in the courts or offices of the State."*

In most states, statutory or common law preclusion doctrines would "by law or usage" bar any attempt to bring a second state antidiscrimination proceeding based on a claim that had been previously determined in an administrative proceeding.

*The statute that has become section 1739 was originally enacted in 1804, in essentially the same form, as part of legislation that also re-enacted the predecessor of section 1738. Act of March 27, 1804, ch. 56, 2 Stat. 298. *See Allen v. McCurry, supra*, 449 U.S. at 96 n.8. Sections 1738 and 1739 were first codified as sections 905 and 906, respectively, of the Revised Statutes. 18 Stat. 171 (1878).

See, e.g., N.Y. Exec. Law § § 297(9), 300 (McKinney Supp. 1972-80). Under the general full faith and credit provisions of Title 28, a Federal court would, according to respondent's logic, then be bound to apply such state preclusion rules to dismiss any Title VII claim based on a grievance that was previously submitted to a state agency. Because Title VII requires complainants to resort to state administrative procedures before going to the EEOC or Federal court, respondent's approach would render the right to a trial *de novo* a nullity in any state that has such procedures.

Thus, respondent's notion of how Title VII and the general full faith and credit statutes must be "read together" would effectively eliminate Federal enforcement of private Title VII claims. Nothing could be further from the legislative intent: "Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims." *Alexander v. Gardner-Denver Co., supra*, 415 U.S. at 60 n.21.

The effect of the decision below is to give a state administrative agency the final power to determine a complainant's substantive Federal statutory rights. Yet this Court has specifically recognized that the legislative history of the 1972 amendments to Title VII reveals "a thorough and meticulous consideration of the question whether an administrative agency or a court should be given primary adjudicative responsibility for particular categories of Title VII complaints." *Chandler v. Roudebush, supra*, 425 U.S. at 853-54. The final decision, of course, was to reject the bills that would have "v est[ed] in an administrative agency rather than in the federal courts the primary adjudicative responsibility", and to provide instead for a "judicial trial *de novo* for private as well as federal employees", *Id.* at 853, 857-

58.* Thus, respondent's reading of Title VII, by effectively vesting "primary adjudicative responsibility" for employment discrimination claims in state agencies, directly contravenes Congress' intention to reject giving any administrative body "primary adjudicative responsibility", *See also* Pet. Brief at 15.**

*Among the proposals rejected by Congress in 1972 were bills that would have given "primary adjudicative responsibility" for private-sector discrimination complaints to the EEOC, and, for discrimination complaints by Federal government employees, to the employing agency, subject in either case to review by the courts of appeals under the Administrative Procedure Act. *Id.*

**In the face of this Court's previous extensive analysis of the legislative history of the *de novo* trial right, respondent plucks from context statement of Senator Javits during the debates on the 1972 amendments to Title VII which it reads to suggest that res judicata might apply in the present case. (Resp. Brief at 35-36; *see also* Amicus Brief of Equal Employment Opportunity Council at 7, 13-15.) A reading of the entire debate makes it clear, however, that Senator Hruska, to whom Senator Javits was responding, while expressing a general desire to reduce duplicative litigation of discrimination claims, had actually focused his concern not on state proceedings, but on the prospect of repeated suits under various other Federal laws that might also prohibit the alleged discrimination.

Among the laws enforced in "half a dozen forums" that Senator Hruska mentioned were the National Labor Relations Act (both as an unfair labor practice and a breach of duty of fair representation), the Equal Pay Act, the Age Discrimination Act, 42 U.S.C. §1981, statutes prohibiting discrimination by Federal contractors, and so forth. 118 Cong. Rec. 3368-69 (1972). But Senator Hruska specifically excluded state proceedings from the amendment that he proposed to make Title VII an exclusive remedy:

> "Then there would be a further exception and that would be proceedings in a State agency. Those proceedings could continue notwithstanding the pendency of an employee's action under section 706 of Title VII. It seems to me and others that this is only fair." 118 Cong. Rec. 3369.

Continued

That Congressional intent was given effect in *New York Gaslight Club, Inc. v. Carey, supra*, where this Court considered "the propriety of EEOC's issuance of the right to sue letter" during the pendency of state proceedings, 447 U.S. at 735 n.5. The right to sue letter is, of course, an essential prerequisite to bringing a Federal court action. The Court ruled that "the Commission was required to issue the letter after 180 days, regardless of the posture of any state proceedings". *Id.*

It follows that a Title VII action may be brought "regardless of the posture of any state proceedings" because the EEOC's duty to issue a right to sue letter would be meaningless (and the time of the Commission, the court and the parties utterly wasted) if a subsequent adverse decision in the state proceedings could have preclusive effect in a pending Federal court action. Once the case is before the Federal court, it has power to afford relief, otherwise available under Title VII, that has not been granted by the state. *New York Gaslight Club, Inc. v. Carey, supra.* In this case, where the "state proceedings" gave no relief, the Federal court has power to grant petitioner the full panoply of Title VII remedies; it cannot dismiss his case without reaching the merits.

Continued from previous page

Thus, Senator Javits' comments, which contain no mention of state administrative proceedings or judicial review thereof, should in context also be read as excluding state proceedings from any application of res judicata in Title VII suits. *See also* H.R. Rep. No. 92-238, 92nd Cong., 2nd. Sess., 1972 U.S. Code Cong. & Ad. News 2137, 2175 (minority report) (criticizing possibility of multiple suits "brought under prior existing federal statutes such as the National Labor Relations Act and the Civil Rights Act of 1866").

In sum, by enacting Title VII, Congress could not have intended to establish a three-tiered structure to review anti-discrimination claims—first, by state proceedings, second, in the EEOC, and third, in the Federal district courts—while at the same time providing that once a decision is made in the first stage of the process, it has conclusive effect thereafter.

II.

THE NEW YORK STATE PROCEDURES FOR DECIDING EMPLOYMENT DISCRIMINATION CLAIMS DO NOT FULFILL THE REQUIREMENTS FOR THE TRIAL DE NOVO INTENDED BY CONGRESS

Even if it is assumed that Title VII does not grant complaints the absolute right to a trial *de novo* in Federal court in all circumstances, it is clear that the New York State procedures for resolving employment discrimination claims that were followed here are not the equivalent of the trial *de novo* to which petitioner is entitled. Setting up a straw man, respondent claims that petitioner has called "into question the fairness of the state procedures" (Resp. Brief at 16), and it proceeds at length to argue that those procedures are fair on their face (Resp. Brief at 13-26). But petitioner has never claimed otherwise. Rather, we make two points with respect to the state proceedings.

First, whatever the procedural rights that may be available in some cases, the NYHRD dismissed this case by entering "skeletal and incomplete findings" of a "conclusory" nature

(U.S. Amicus Brief at 2 n.3, 17),* without holding a hearing, without petitioner being able to confront or cross-examine respondent or other witnesses,** without calling any witness other than petitioner, and without making a formal record. In these circumstances, whatever "opportunity" petitioner had for a "full and fair hearing" was not realized, and even under the traditional doctrine of collateral estoppel he would not be bound in the later proceeding. *Montana v. United States*, 440 U.S. 147, 164 n.11 (1979).

Second, whether or not the state administrative procedures were "full and fair", they are simply not equivalent to those in a Federal district court. This does not mean, as respondent implies, that we argue they are unconstitutional (Resp. Br. at 23). Rather, it is further evidence that such procedures do not

*See J.A. 13. Moreover, as the district court noted, even the decision that was entered mentioned only Chemico's failure to rehire petitioner. There was no finding or conclusion with respect to his claim that his initial discharge was illegal. J.A. 45; 464 F.Supp. 468, 471 (S.D.N.Y. 1978) (Pierce, J.).

**Respondent points out that petitioner "had the right to request the NYHRD to issue subpoenas". (Resp. Brief at 22.) What respondent does not say is that the NYHRD notice did not inform petitioner of this right (*see* S.A. 1), that under NYHRD regulations that it cites a *pro se* complainant is required to make "a showing of necessity" to obtain a subpoena (S.A. 64), and that, in any event:

> "This power [of NYHRD] to issue subpoenas . . .was designed to make evidence available at a hearing on the merits . . . If the division requires preliminary information obtainable by subpoena, the statute provides it with that authority, but before the hearing stage the division should be free to work its will without interference by the complainant's private attorney, and the complainant is not permitted to use the subpoena power as a discovery device." *State Division of Human Rights v. University of Rochester*, 53 A.D.2d 1020, 386 N.Y.S.2d 147 (4th Dep't 1976).

meet the Congressional directive that a trial *de novo*, in which "both parties are entitled to an inquiry by a court into the charges", *Blizard v. Fielding*, 572 F.2d 13, 16 (1st Cir. 1978), is required in Title VII cases.*

The fact that the NYHRD decision was "confirmed" by the Appellate Division under an "arbitrary and capricious" standard of review does not mean that the state procedure is entitled to preclusive effect under Title VII. Because the Appellate Division operates under a limited standard of review in appeals of discrimination claims, it cannot exercise "primary adjudicative responsibility" for such claims. Yet as we have shown above, Congress in Title VII "chose to permit *de novo* judicial trial . . .rather than mere judicial review" of agency discriminations. *Chandler v. Roudebush, supra*, 425 U.S. at 852. In contrast to the situation in *Allen v. McCurry*,

*As those members of Congress who successfully advocated a trial *de novo* in 1972 argued:

> "The appropriate forum to resolve civil rights questions, questions of employment discrimination . . ., is a court. Civil rights issues usually arouse strong emotions. United States district court proceedings provide procedural safeguards; Federal judges are well known in their areas and enjoy great respect; the forum is convenient for the litigants and is impartial; the proceedings are public, and the judge has power to resolve the problem and fashion a complete remedy.
>
> "The district court approach has a great advantage over an administrative hearing procedure in securing the needed evidence. Experience has shown that investigations, which are aimed simply at developing enough evidence to find reasonable cause, fall short of providing adequate evidence for obtaining a decision where the standard, as it is in the courts, is a preponderance of evidence on the record." H.R. Rep. No. 92-238, *supra*, 1972 U.S. Code Cong. & Admin. News at 2172 (minority report).

supra, where the state court had held a full adversarial evidentiary hearing on the precise Federal Fourth Amendment claim that the plaintiff was precluded form relitigating in Federal court, in this case the state court has not found any facts nor conducted any evidentiary hearing on the Federal issue.* Mr. Kremer is not seeking what respondent characterizes as his "second bite at the apple" (Resp. Brief at 30) of judicial fact-finding, but his first.

III.

CONGRESS INTENDED LIMITED DUPLICATION OF STATE AND FEDERAL ENFORCEMENT OF ANTIDISCRIMINATION STATUTES

Respondent brushes aside the fact that, if the decision below stands, it will "ensure that almost all Title VII

*Obviously, we are not making the abstract claim, implied by respondent, that the state judicial system is any less suited for resolving the merits of discrimination claims than the Federal courts. The decision to grant the right to a Federal forum was made by Congress. And, the state court decision was not on the merits of petitioner's claim because, as in the case of judicial review of an artibrator's ruling, "[t]he court cannot review the merits of the . . .decision", *Aleem v. General Felt Industries, Inc.*, *supra*, slip op. at 5590, except under the arbitrary and capricious standard.

Allen v. McCurry, *supra*, is also distinguishable in this case because it was an action brought under 42 U.S.C. §1983. As the Seventh Circuit has held, reliance on *Allen v. McCurry* is "misplaced" because "the statutory and congressional history" of section 1983, "in in direct contrast to the abundant statutory and legislative evidence that Title VII envisions a dual federal and state enforcement scheme culminating in an independent right to a trial *de novo* in federal court." *Unger v. Consolidated Foods, Inc.*, *supra*, 657 F.2d at 914 n.5.

complaintants would abandon state proceedings as soon as possible", *New York Gaslight Club, Inc. v. Carey*, *supra*, 447 U.S. at 66 n.6, to avoid any risk of losing their right to a Federal court trial *de novo*. Yet this Court has expressed particular concern lest "the existence of an incentive to get into federal court . . . undermine Congress' intent to encourage full use of state remedies". *Id. Cf. Alexander v. Gardner-Denver Co.*, *supra*, 415 U.S. at 59. Finally, to the extent that granting trials *de novo* results in duplicative state and federal enforcement efforts or increased burdens on employers, "Congress has made the choice". *Chandler v. Roudebush*, *supra*, 425 U.S. at 864.

CONCLUSION

For the reasons discussed above, in the Brief of Petitioner and in the Amicus Brief for the United States and the Equal Employment Opportunity Commission, the judgment of the Court of Appeals should be reversed and the case remanded for trial.

Respectfully submitted,

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